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IN THE

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 324

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PRESTON A. TATE,

Petitioner,

v.

HERMAN SHORT, Chief of Police,
Houston, Texas,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 445 S.W.2d 210 (1969), and a copy of that opinion appears in the separately printed Appendix. (A. 5).* The opinion of the County Criminal Court at Law No. 1 of Harris County, Texas was not reported and a copy of that opinion appears in the Appendix. (A. 33).

*References to the separately printed Appendix will be noted as A. References to the appendix to this brief will be noted App. Br.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on July 16, 1969. A timely petition for rehearing was denied on October 22, 1969. On January 9, 1970, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to March 21, 1970. This Court granted a writ of certiorari in this case on June 28, 1970. On July 28, 1970, the Clerk of the Court granted an application for an extension of time to file the Petitioner's brief on the merits to September 1, 1970. Jurisdiction rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether imprisonment of an indigent for failure to make immediate payment of a fine, where imprisonment is not an authorized punishment for the substantive offense, denies him the equal protection of the laws and due process of law, as guaranteed by the Fourteenth Amendment?
2. Whether imprisonment of an indigent for failure to make immediate payment of a fine, without a hearing to determine the reasons for his nonpayment, denies him the equal protection of the laws and due process of law, as guaranteed by the Fourteenth Amendment?
3. Whether imprisonment of an indigent for failure to pay a fine, at a rate fixed by statute of one day in jail for each unpaid five dollars of fine, denies him due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

This case involves the following statutes of the State of Texas:

Code of Criminal Procedure:**Art. 4.14 Corporation court**

The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, and arising within such corporate limits.

Art. 45.53 Discharged from jail

A defendant placed in jail on account of failure to pay the fine and costs can be discharged on habeas corpus by showing:

1. That he is too poor to pay the fine and costs; and
2. That he has remained in jail a sufficient length of time to satisfy the fine and costs, at the rate of \$5 for each day.

But the defendant shall, in no case under this Article, be discharged until he has been imprisoned at least five days; and a justice of the peace may discharge the defendant upon his showing the same cause, by application to such justice; and when such application is granted, the justice shall note the same on his docket.

This case involves the following sections of the Code for the City of Houston, Texas:

**Section 15-60: Commitment to Jail Until Fine Paid:
Stay of Judgment:**

Unless a judgment for fine by the corporation court is appealed from and an appeal bond approved and filed, it shall be the duty of the clerk to forthwith issue a commitment, directed to the chief of police, or, any policeman of the city, to commit the defendant to the city jail or city farm until the full

amount of the fine is paid, or until the defendant is discharged according to law; provided, for good cause shown, the judge of the corporation court, in his discretion, may order a stay of judgment for a period not to exceed thirty (30) days, in which event the defendant shall not be committed to the city jail or city farm until after the expiration of the time such judgment is held in abeyance.

Section 35-8: Credit Against Fine for Service in Jail or Municipal Prison Farm:

Each person committed to the county jail or to the municipal prison farm for non-payment of their fine arising out of his conviction of a misdemeanor in the corporation court shall receive a credit against such fine of five dollars (\$5.00) for each day or fraction of a day that he has served.

STATEMENT

On August 7, 1968, Petitioner was found guilty, in the Corporation Court of Houston, Texas, of several traffic offenses. (A. 49). The Corporation Court is a court of limited jurisdiction which cannot hear and decide cases involving crimes for which imprisonment is an authorized punishment. Texas Code Crim. Proc. art. 4.14. Nor is it authorized to sentence anyone to prison for violating a substantive criminal law. The fines imposed upon Petitioner, when added to certain other fines imposed in 1966 and which remained unpaid, aggregated \$425. (A. 49). In accordance with the provisions of article 45.53 of the Texas Code of Criminal Procedure and Section 15-60 of the Houston Code, when Petitioner was unable to make immediate payment, he was committed to the Houston Prison Farm in the custody of the Respondent, Herman Short, Houston Police Chief. (A. 49). At the rate of \$5.00 per day, specified under both state and local law, he would be required to serve 85 days in jail in lieu of the fine.

Petitioner's incarceration was temporarily terminated on August 28, 1968, after 21 days in custody, when he was released on a \$500 habeas corpus bond. At that time Petitioner had, and still has, 64 days to serve unless he makes payment of \$320.

On August 20, 1968, Petitioner applied to the County Criminal Court at Law No. 1 of Harris County, Texas for a writ of habeas corpus. (A. 20). In his affidavit accompanying the application, Petitioner swore, "I am imprisoned, as a result of being unable to pay a fine . . . [in several] causes.

"Because I am too poor, I am, therefore, unable to pay the accumulated fine of \$425.00 . . .

"And I cannot elect to satisfy the fine by payment of same as a result of my poverty.

"Because of my imprisonment, my ability to gain a livelihood [sic] is fundamentally and seriously impaired." (A. 22).

The State did not deny these allegations. Moreover, at the hearing on the application, the State stipulated that Petitioner "is poverty stricken, and that his whole family has been for all periods of time therein [sic], and probably always will be." (App. Br. 7a). Petitioner's uncontradicted testimony at the hearing was that, prior to arrest, he was employed and earned between twenty-five and sixty dollars a week. (App. Br. 3a). This was augmented by a monthly pension check from the Veterans Administration of one hundred and four dollars. (App. Br. 3a). Petitioner has a wife and two children dependent on him for support. (App. Br. 2a-3a). He desired his freedom so he could obtain a job and thereby be able to pay off his fine. (App. Br. 6a).

Petitioner testified that he informed the judge who presided over his 1968 trial for the traffic violations of his indigency. (App. Br. 6a). In regard to his 1966 conviction and fines, Petitioner testified, without contradiction or

impeachment, that he was relying on his attorney to prosecute an appeal (App. Br. 4a-5a) and for that purpose had given the attorney his trailer plus some cash. (App. Br. 5a). The attorney, who was subsequently disbarred for other reasons (App. Br. 7a-8a), apparently failed to perfect the appeal.¹ There is nothing in the record to indicate that Petitioner was aware or should have been aware that the 1966 judgment had become final.

The County Criminal Court denied Petitioner's application for a writ of habeas corpus. The Court of Criminal Appeals affirmed. It "overrule[d] appellant's contention that because he is too poor to pay the fines his imprisonment is unconstitutional." 445 S.W.2d 210 (1969) (A. 5). It is this judgment from which a petition for certiorari was filed in this case.

ARGUMENT

I. Under *Williams v. Illinois*, 90 S. Ct. 2018 (1970), Imprisonment of an Indigent for Failure To Make Immediate Payment of a Fine, Where Imprisonment Is Not an Authorized Punishment for the Substantive Offense, Denies Him the Equal Protection of the Laws.

This case is squarely governed by the recent decision in *Williams v. Illinois*, in which the Court held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." 90 S.Ct. at 2023-24 (footnote omitted). The decision rested on the constitutional command, well established since *Griffin v. Illinois*, 351 U.S.

¹ This is normally accomplished by posting an appeal bond within 10 days. Texas Code Crim. Proc. arts. 44.14, 44.16.

12 (1956),² "to alleviate discrimination against those who are unable to meet the costs of litigation in the administration of criminal justice." *Williams v. Illinois*, 90 S.Ct. at 2022.

The same considerations apply here. The Corporation Court of Houston, in which Petitioner was convicted, has no jurisdiction to hear cases in which imprisonment is an authorized punishment and thus has no jurisdiction to impose a jail sentence. Texas Code Crim. Proc. art. 4.14. Accordingly, the "statutory ceiling placed on imprisonment for [the] substantive offense" in this case is zero days. Even though Petitioner, unlike Williams, was not sentenced to prison *and* a fine,³ in effect Petitioner was given the maximum prison term authorized by the Texas legislature. It is therefore a violation of equal protection to impose a jail sentence on the Petitioner because to do so imprisons him beyond the maximum term that is authorized under the laws of Texas.

Despite the fact that the Texas statute seems to apply equally to all in the sense that all persons fined are given a chance to satisfy the money judgment imposed against them, this is a specious form of equality as far as paupers are concerned. As Chief Justice Burger pointed out in the *Williams* case:

²See also *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959).

³Petitioner here, like the appellant in *Williams*, was not given an "alternative sentence,"—e.g., "thirty days or thirty dollars." In other words, this is not a case in which a judge, within his broad sentencing discretion, decided that the appropriate punishment for the particular defendant before him was either a fine or what the judge has determined, with due regard for the particular circumstances of the individual defendant, to be an "equivalent" jail term. This is not such a case because (1) the judge made no such determination, and (2) he could not legally have done so, since imprisonment is not authorized by statute for these offenses.

Since only a convicted person with access to funds can avoid the increased imprisonment the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment. 90 S.Ct. at 2023 (footnote omitted).

It might be argued that this case is distinguishable from *Williams* because a defendant who is sentenced to a fine and imprisonment is assured of *some* punishment even if he is financially unable to pay the fine, while a defendant convicted under a statute for which no jail sentence could be imposed will escape punishment. But this argument misreads both the *Williams* decision and Petitioner's contention here. As the Court pointed out in *Williams*, there are "numerous alternatives" to which the State may resort to enforce its judgment against those not immediately able to pay. 90 S.Ct. at 2024. "The State is not powerless to enforce judgments against those financially unable to pay a fine. . . ." *Id.*

The most promising alternative is to allow a defendant to pay off a fine in installments. This procedure, which is used in several states,⁴ has been widely endorsed⁵ and has

⁴E.g., Cal. Pen. Code § 1205 (West 1956) (misdemeanors); Del. Code Ann. tit. 11 § 4332(c) (Supp. 1968); Md. Ann. Code art. 38 § 4(a)(2) as amended by ch. 147 of the Laws of Maryland, 1970; Mass. Ann. Laws ch. 279 § 1A (1968) (probation); N.Y. Code Crim. Proc. § 470-d(1)(b) (McKinney Supp. 1969); Pa. Stat. Ann. tit. 19 § 953-56 (1964); Wash. Rev. Code Ann. § 9.92.070 (1961). These alternatives, where available, are discretionary.

⁵National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code § 3302(4) (1970); ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and

been highly successful in practice.⁶ A large percentage of those given the chance are able to pay off the fine and avoid jail, sometimes with the assistance of garnishment procedures. In addition, because much of the prison population is held due to an inability to pay a fine,⁷ a state stands to gain a considerable saving by using the installment plan—it saves the expense of maintaining a prisoner,⁸ it often collects the fine,⁹ and in many cases it avoids the necessity of supporting the defendant's family under the state welfare program.¹⁰

Procedures § 2.7(b) (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 18 (1967); Model Penal Code § 302.1(1) (Proposed Official Draft 1962). See also Comment, 1966 U. Ill. L. F. 460; Note, 64 Mich. L. Rev. 938 (1966); Note, 50 Minn. L. Rev. 1152 (1966); Note, 22 Vand. L. Rev. 611 (1969).

⁶Sellin, Recent Penal Legislation in Sweden 14 (1947); Binford, Installment Collection of Fines by a County Court, Proc. Cong. Amer. Prison Assoc. 361 (1937); Cordes, Fines and Their Enforcement, 2 J. Crim. Sci. 46 (Radzinowicz & Turner ed. 1950); all cited in Notes, Fines and Fining—An Evaluation, 101 U. Pa. L. Rev. 1013, 1022-23 (1953).

⁷ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures 119-20 (Approved Draft 1968); A.L.I. Model Penal Code, Comment to § 7.02 (Tent. Draft No. 2, 1954); President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report: The Courts 18 (1967).

⁸President's Comm'n on Law Enforcement, Task Force Report: The Courts 15 (1967); S. Rubin, H. Weihofen, A. Edwards & S. Rosenzweig, The Law of Criminal Correction 253 & n.154 (1963).

⁹See authorities cited in note 6 *supra*.

¹⁰See ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures 120-21 (Approved Draft 1968); President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report; The Courts 15 (1967); E. Sutherland & D. Cressey, Principles of Criminology 276 (6th ed. 1960); Binford, Installment Collection of Fines by a County Court, Proc. Cong. Amer. Prison Ass'n 361, 366 (1937).

Under other alternatives to the present system, a State might assist the defendant in finding employment or put him to work for the state, or, as the Court noted in *Williams*, impose a parole requirement that an impoverished defendant do specified work during the day to satisfy a fine. 90 S.Ct. at 2024 n. 21. The key point is that reasonable and empirically tested alternatives are available, which individual states may tailor to their own preference. What states may *not* do is what Texas did here—automatically incarcerate around the clock an individual who is not able to pay a fine.

A requirement that states pursue reasonable alternatives to the procedure employed here is fully consistent with the long line of decisions in this Court holding that “Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored.” *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Discriminations on the basis of wealth are subject to “the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.” *Loving v. Virginia*, 388 U.S. 1, 9 (1967). See also *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969) (Equal Protection Clause requires “a careful examination on our part . . . where lines are drawn on the basis of wealth or race. . . .”).

For states to pursue reasonable alternatives to the present abrupt procedure is also consistent with the many cases that require state laws infringing on constitutional interests, including personal liberty, to be drawn as narrowly as possible, even where the purposes of the state are legitimate and substantial. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969); *Johnson v. Avery*, 393 U.S. 483, 488-90 (1969); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-08 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Talley v. California*, 362 U.S. 60, 63 (1960); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

The *Shapiro*, *Johnson* and *Dean Milk* cases make it clear that this principle is not restricted to instances involving the First Amendment.

In maintaining that the state be required to pursue reasonable alternatives—which, as indicated in *Williams*, are available in several states¹¹—Petitioner notes that this is not a case in which an individual is able to pay his fine, but wilfully refuses to do so. Nor is this a case in which a state has jailed an indigent “who, despite his own reasonable efforts and the State’s attempt at accomodation, is unable to secure the necessary funds.” *Morris v. Schoonfield*, 90 S.Ct. 2232, 2233 (1970) (White, J., concurring). There is no evidence in the record that Petitioner wilfully refused to pay; indeed his indigency was plain and conceded by the State. (App. Br. 7a). Still less is there any evidence that the State attempted to “accommodate” petitioner in any way to alleviate the discrimination that is inherent in the present statutory scheme.

Nor should Petitioner be prejudiced by non-payment of the fines levied against him in 1966; there is no evidence in the record indicating that he wilfully refused to pay them, or even was aware he had to pay. Petitioner relied upon his attorney to appeal those convictions, having given him a trailer and some cash for this purpose. (App. Br. 4a-5a). The attorney, who was subsequently disbarred for other reasons (App. Br. 7a-8a), failed to perfect the appeal, and this fact was unknown to Petitioner.¹²

¹¹ See authorities cited in note 4 *supra*.

¹² Had the attorney perfected the appeal, Petitioner would have been under no obligation to pay the fine because he would have been entitled to a trial de novo in the county court, Code Crim. Proc. arts. 44.17, 45.10, and the judgment of the Corporation Court would have lacked finality. See *Deal v. State*, 423 S.W.3d 929, 931 (Tex. Crim. App. 1968); Houston Code § 15-60.

The conceivable justifications for incarcerating a defendant for failure to make an immediate, lump-sum payment of fines are plainly insufficient, both in principle and under the *Williams* decision itself. The traditional reason for jailing persons who do not pay is to coerce them into compliance. But it is obvious that if a person is simply unable to pay he cannot be coerced into doing so. To jail a person summarily for this purpose is plainly unconstitutional. See *Morris v. Schoonfield*, 301 F.Supp. 158, 163 (D. Md. 1969), vacated on other grounds, 90 S.Ct. 2232 (1970).

A second conceivable justification is administrative convenience. But this justification is also insufficient. "[T]he constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Williams*, 90 S.Ct. at 2024; see also *id.* at 2033 (Mr. Justice Harlan, concurring). Moreover, it is not more convenient to imprison persons who cannot pay fines than to allow such persons to pay on the installment plan. Each man in prison costs the state a large and growing amount.¹³ At the same time, the fine goes uncollected, and, as pointed out above, persons dependent upon the jailed defendant often are forced to seek public assistance, at substantial cost to the public.

The National Commission on Reform of Federal Criminal Laws, in its Study Draft of a new Federal Criminal Code (1970), has endorsed a procedure similar to that urged by Petitioner. Characterizing existing provisions of Federal law (similar to many state laws) dealing with non-payment of fines as "arbitrary" (Study Draft, Comment to § 3304), the Commission would limit imprisonment for failure to pay fines to cases of wilful refusal. "Imprisonment is therefore permitted only in the case where the defendant can pay (or could have paid) the fine, but will not pay it." 2 Working Papers of the National Commission of Reform of Federal Criminal Laws 1328 (1970). The

¹³See authorities cited in note 8 *supra*.

Study Draft proposes that, when a fine is levied, "the court shall not impose at the same time an alternative sentence to be served in the event that the fine is not paid." Section 3302(5). If the defendant fails to pay the fine, or any installment, he may be required to show cause why he should not be imprisoned. Section 3304(1). If it appears that his default is excusable—i.e., that he made "a good faith effort to obtain the necessary funds for payment" or that he did not intentionally refuse to make the payment—the court cannot imprison him. See Section 3304(2), (3). Moreover, the court is empowered, where the default is excusable, to enter an order "allowing the defendant additional time for payment, reducing the amount of the fine or of each installment, or revoking the fine or the unpaid portion in whole or in part." Section 3304(3).¹⁴

In short, while a state has a legitimate interest in punishing those who violate the law, once it determines that a fine is the only punishment for a particular law violation, it cannot automatically imprison an individual who is unable to make immediate payment of the fine. To do so, as Texas has in this case, is inconsistent with the Equal Protection Clause of the fourteenth Amendment.

¹⁴A similar statutory scheme is proposed in the Model Penal Code, §§ 302.1 to .3 (Proposed Official Draft 1962) and by the ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 6.5(b) (Approved Draft 1968). "[I]mprisonment of an offender who does not have the means to pay—barring the rare but not unknown case of the defendant who deliberately deprives himself of the means to pay—should not be tolerated." *Id.* at 288.

II. Imprisonment of an Indigent for Failure To Make Immediate Payment of a Fine, Where Imprisonment Is Not an Authorized Punishment for the Substantive Offense, Denies Him Due Process of Law.

This Court has recognized that state action that is "patently arbitrary" and "utterly lacking in rational justification" is barred by the Due Process Clause of the Fourteenth Amendment. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960). Moreover, "there are limits to the extent to which the presumption of constitutionality can be pressed" where a "basic liberty" is concerned. *Skinner v. Oklahoma*, 316 U.S. 535, 544 (1942). See also *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

The decision of Texas to imprison Petitioner for non-payment of his fine is plainly invalid under the prevailing due process test. Although "A state has wide latitude in fixing the punishment for state crimes," *Williams v. Illinois*, 90 S.Ct. at 2022, once it has determined, as in this case, that a fine is the only appropriate punishment for an offense, "the administrative inconvenience in a judgment collection procedure does not, as a matter of due process, justify sending to jail or extending the jail term of individuals who possess no accumulated assets." *Williams v. Illinois*, 90 S.Ct. at 2034 (Harlan, J., concurring) (footnote omitted).

In *Williams*, Justice Harlan fully developed the reasons why the use of jail rather than an installment collection procedure or other alternative means of assuring payment of a fine is "utterly lacking rational justification." In the first place, the convenience of jailing persons unable to make immediate lump-sum payment is not a constitutionally sufficient justification. Second, it is "doubtful" that a legislature could rationally determine that only by lump-sum payment can a fine operate as an effective deterrent. Third, it is "most unlikely" that the legislature had made a "considered judgment" that it was "rational and necessary" that jail be the sole alternative to lump-sum payment. 90 S.Ct. at 2033-34.

In this case, where the State both by its substantive and jurisdictional law has clearly evinced a determination that Petitioner's traffic violations be punished by fine alone, his imprisonment for failure to make immediate payment suffers from precisely the due process defects that Justice Harlan found in *Williams*. First, the insufficiency of the justification based on convenience is the same as in *Williams*. Second, the requirement of immediate, lump-sum payment is no more rational than in *Williams*. Third, it seems clear here that the responsible legislative bodies did *not* determine that an immediate, lump-sum payment was necessary for the fine to have a deterrent effect. Apart from the absence of an affirmative expression to this effect, any suggestion of immediacy is negated by Section 15-60 of the Houston Code, which provides that the corporation court judge has the discretion to stay a judgment of that court for up to thirty days, and by Article 42.13 § 5(b)(8) (Supp. 1969) of the Texas Code of Criminal Procedure, which authorizes installment payments as a condition of probation, but which is inapplicable to cases within the jurisdiction of the corporation court.

Justice Harlan recognized in the *Williams* case that the fact that a State imposed a fine alone rather than a fine plus a prison term should have no bearing on the constitutional judgment under the Due Process Clause. He said:

[N]o distinction [should be made] between circumstances where the State through its judicial agent determines that effective punishment requires less than the maximum prison term plus a fine, *or a fine alone*, and the circumstances of . . . [the Williams] case." 90 S.Ct. at 2034 (footnote) (emphasis added).

Furthermore, the circumstance that the determination was made here by the State Legislature rather than its "judicial agent" underlines the irrationality of imprisonment in this case. Where a judge has no discretion to impose a prison sentence for a violation of law, jailing for

nonpayment is all the more invalid under the standards of the Due Process Clause.¹⁵

¹⁵A separate denial of due process in this case is the equation (under Section 35-8 of the Houston City Code and Texas Code Crim. Proc. art. 45.53) of one day in jail for each five dollars of fine. This is a patently unreasonable and arbitrary basis for determining the length of Petitioner's incarceration. States have set different figures for converting dollars of fines into days of imprisonment. See Note, Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days," 57 Calif. L. Rev. 778, 779 n.3 (1969). Although five dollars per day appears to be close to the median, it is nevertheless unreasonable.

The deplorable conditions in prisons, and the inconvenience, humiliation, and stigma that accompany "doing time" in jail, are well known. Would any person possessing financial means choose to spend ten days in jail in lieu of a \$50 fine? Clearly not. Professor Kent Greenawalt has suggested that ten dollars a day is the *minimum* "civilized" rate of conversion, and that even that rate should not be enforced "unless there were evidence that the relevant legislative body or trial judge had adverted to the problem of fairness." Greenawalt, Constitutional Law, 1966 Survey of New York Law, 18 Syr. L. Rev. 180, 197 & n.109 (1967). See also *Strattman v. Studt*, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969) (rate of three dollars per day unreasonable under the Fourteenth Amendment).

This conclusion is consistent with the even stronger conclusion of the American Bar Association that "The exclusive use of a dollar-day ratio both presents the possibility of a brutally long sentence and provides as a measure an arbitrary figure which makes no economic sense and which bears no relation to the factors which ought to govern a choice as to the length of a sentence." ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures 292 (Approved Draft 1968); compare *United States ex rel. Privitera v. Kross*, 239 F.Supp. 118 (S.D.N.Y.), aff'd mem., 345 F.2d 533 (2nd Cir.), cert. denied, 382 U.S. 911 (1965) (sentencing judge exercised discretion to impose a jail sentence that was, in his judgment, equivalent to the fine imposed).

III. Imprisonment of an Indigent for Failure To Make Immediate Payment of a Fine, Without a Hearing To Determine the Reasons for Non-payment, Denies Him Due Process of Law and the Equal Protection of the Laws.

In *Specht v. Patterson*, 386 U.S. 605 (1967), the Court unanimously held that the Due Process Clause required Colorado to hold a hearing with appropriate procedural safeguards before it could invoke its Sex Offenders Act, which becomes operative when a person convicted of specified sex offenses "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." *Id.* at 607. The Court recognized that "the invocation of the . . . Act means the making of a new charge leading to criminal punishment." *Id.* at 610.

The philosophy underlying the *Specht* decision is applicable to the case at hand. Here, too, there is a "new charge" that can lead to "criminal punishment." The charge, of course, is failure to pay the fine levied on the Petitioner, and the criminal punishment is the jail sentence which Petitioner summarily received upon his failure to make the payment. As in *Specht*, the State should not be able to take this action without satisfying the requirements of due process under the Fourteenth Amendment.

A hearing is also required by the Equal Protection Clause. "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). "The Equal Protection Clause . . . imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966). Yet a statute requiring commitment for failure to pay a fine is irrationally overbroad in that it lumps together persons unable to pay the fine with persons who, although able, wilfully refuse to pay.

Accordingly, under both due process and equal protection standards a hearing is required to ascertain whether a defendant's nonpayment amounts to a wilful refusal, in which case confinement is appropriate, or instead was caused by his inability to pay, in which case immediate confinement should not be permitted.

A three judge district court unanimously reached this conclusion in *Morris v. Schoonfield*, 301 F.Supp. 158 (D. Md. 1969), vacated on other grounds, 90 S.Ct. 2232 (1970). The district court said:

We are satisfied that Article 38, sections 1 and 4 *cannot be applied constitutionally* to an indigent defendant unless he is given an opportunity to tell the judge that he is financially unable to pay the fine before he is committed for nonpayment, so that the judge may take that factor into account. 301 F.Supp. at 163 (emphasis added).¹⁶

A recent authoritative report of The National Commission on Reform of Federal Criminal Laws (1970) reached the same conclusion. The Commission's Study Draft provides that if there is default in the payment of a fine a show cause hearing should be held to determine whether the defendant could be imprisoned—either because of "an intentional refusal" to pay or a "failure on his part to make a good faith effort to obtain the necessary funds for payment." Section 3304. The Comment to this section states:

The proposed approach . . . is to require a separate proceeding to determine whether there was such culpability for the nonpayment as to warrant a prison sanction in the first place, and to grant such power to the court as to permit flexibility in treatment of the nonpayer

The above authorities underscore the conclusion that the factual determination involved here is of critical importance

¹⁶The three judge court explicitly rested its decision on both the Due Process and Equal Protection Clauses. 301 F.Supp. at 163.

to the indigent defendant. In other circumstances where liberty was involved this Court has required a hearing measuring up to the standards of due process. E.g., *In re Gault*, 387 U.S. 1 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966). A hearing has also been required in a variety of cases in which other important interests were at issue. E.g., *Goldberg v. Kelly*, 90 S.Ct. 1011 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). As Mr. Justice Frankfurter said, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951): The extent to which due process must be afforded is influenced by the extent to which an individual may be "condemned to suffer grievous loss." The loss of personal liberty is surely sufficiently "grievous" to require the application of due process standards, and it is therefore imperative that the State hold a hearing before imprisoning Petitioner and other indigents for failure to pay a fine.¹⁷ The failure to do so here violated the Fourteenth Amendment.

¹⁷A recent comprehensive analysis reached the same conclusion: "Since the offender's liberty may be at stake, he should have opportunity to present testimony in his behalf . . ." Note, Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days," 57 Calif. L. Rev. 778, 820 (1969). See also Note, Fines and Fining—An Evaluation, 101 U. Pa. L. Rev. 1013, 1024 (1953).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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August, 1970

APPENDIX TO THE BRIEF

No. 245,832

EX PARTE:
PRESTON A. TATE**IN THE COUNTY CRIMINAL
COURT AT LAW NO. 1 OF
HARRIS COUNTY, TEXAS****STATEMENT OF FACTS ON WRIT OF
HABEAS CORPUS HEARING**

[1] BE IT REMEMBERED that upon the 30th day of August, A.D., 1968, the above entitled and numbered cause came on for hearing before the HONORABLE LEE DUGGAN, JR., JUDGE of County Criminal Court at Law No. 1 of Harris County, Texas, and both the Defendant and the State of Texas appearing in person and by Counsel, the following proceedings were had:

APPEARANCES:

FOR THE STATE OF TEXAS: Mr. Joe Moss
Mr. Don Lambright
Assistant District Attorneys
Criminal Courts Building
Houston, Texas 77002

FOR THE RELATOR: Mr. Peter S. Navarro, Jr.
Attorney at Law
6731 Harrisburg Street
Houston, Texas 77011

* * *

[10] MR. PRESTON TATE, called as a witness, after first being duly sworn, testified as follows:

DIRECT EXAMINATION**QUESTIONS BY MR. NAVARRO:**

- Q. Would you state your name to the Court, please, sir?
A. Preston Armour Tate.
Q. Where do you reside, Mr. Tate? A. 6205½ Sherman,
Houston, Texas.

Q. Is that in Houston, Harris County, Texas? A. Yes, sir.

Q. How long have you been residing in this City? A. Approximately 20 years.

Q. Are you married, Mr. Tate? A. Yes, sir.

Q. And, what is the name of your wife? A. Ada Ruth Tate.

Q. Do you have any children? A. Yes, sir.

Q. Are those children's names Robert Tate and David Keith Tate? A. Yes, sir.

Q. Are both of them living with you when you are at home? [11] A. Yes, sir.

Q. Is Robert age two? A. Yes, sir.

Q. And, is David Keith eight weeks old? A. Yes, sir.

Q. Are you employed at the present time, Mr. Tate? A. Yes. I had a job the day I was arrested.

Q. That was not my question. Are you employed at the present time? A. No, sir.

Q. Were you employed on or about August 7, 1968, on the date that you were arrested? A. Yes, sir.

Q. Who were you employed with? A. I was working with Royal Homes as a grouper.

Q. And, previous to August 7, 1968, how long had you been employed with that company? A. Some few weeks.

Q. Previous to that employment, what kind of work did you do? A. I worked for a service station two days.

Q. And, previous to that time? A. I owned my own place of business.

Q. What kind of business was that? A. A repair shop for motorcycles and cars.

[12] Q. You did general repair work in your neighborhood, is that your testimony? A. Yes, sir.

Q. Does your wife work? A. Not at present.

Q. Was she working on or about August 7, 1968? A. No, sir.

Q. Has she ever worked during your marriage? A. Yes, sir. She has worked a lot.

Q. Now then, on the date you were arrested, what were your earnings on a weekly basis, Mr. Tate? A. Approximately twenty-five to about sixty a week.

Q. And, with that money that you earned, did you pay rent, buy groceries, pay utilities and support your family? A. Pay rent and buy groceries. The utilities are usually furnished.

Q. Do you receive any compensation from the Veteran's Administration as a result of disability you received at one time? A. Yes, sir.

Q. And, how much is that a month? A. It has been \$104.00 a month for a few months.

Q. Previous to the few months, how much was it? A. None. None.

[13] Q. How much? A. None, sir.

Q. You just commenced—within the past—within a period of the last two or three months you commenced receiving Veteran's Administration disability payments? A. Yes, sir.

Q. Now, combining what you get from the Veteran's Administration and what you receive from working during the week, you support and maintain your family. Is that your testimony? A. Yes, sir.

* * *

[15] Q. Did you ever find out during the time you were in prison that you could get out of jail and by what means? A. The only—only by telling that it happened as I remembered in the past since the tickets were issued me about May or June of 1966.

Q. But, were you ever told you could get out of jail by paying fines? A. No, sir, I was not.

Q. You weren't told by anyone at the Police Station? A. No, sir.

Q. Were you told by the Judge that heard your cases? A. The Judge did not say.

Q. In other words, you did not know you could get out of jail by paying these fines off? A. I did not.

Q. You did not? A. I did not. I was not told how much I had been convicted for or committed to pay.

[16] Q. You did not know, or did you know how much money you were fined totalled? A. Three hundred fifty dollars and then the other seventy-five dollars that had been prior to that.

Q. And, what else? A. That was all they declared. Not anything else was said.

* * *

Q. Tell the Court what you understand Capias to mean? A. Capias Pro Fine, as I understand it, is a fine or a series of fines that's been imposed by the Trial Judge on the one found guilty, and you're supposed to pay them.

Q. You're given a certain amount of time to pay, isn't that right? A. I suppose. I wasn't given any certain time to pay it.

Q. Do you recall those two allegations of running [17] a red light, dated May 27, 1966? A. I do.

Q. Did you appear before Judge Guinn? A. I did.

Q. Do you remember that pretty well? A. Yes, sir.

Q. Were you represented at that time by an attorney? A. I was.

Q. And, were several fines imposed at that time? A. There were two imposed at that time.

Q. Did you want your attorney to appeal those cases? A. Yes, sir. I asked that they be appealed. I asked the Attorney to appeal those cases, and I was relying on him to appeal them.

Q. Did you pay for that appeal? A. I did.

Q. Was it your understanding that you had paid for that appeal? A. Sir?

Q. Was it your understanding that you had paid for that appeal? A. I did.

Q. All right, and is that the reason you didn't [18] know more about these two tickets? Is that correct? A. I had no reason to do anything about them, as I had an attorney representing me.

Q. How about these other tickets, the two No Texas Operator's License, and the other, the running a stop sign and this expired license plates. Did you incur those this year? A. I didn't get any this year.

Q. What about the other tickets, other than these ones? A. They were simultaneously, in the middle of 1966.

Q. What about the other ones? A. They were back in 1966.

Q. Then, these are real old tickets? A. Yes, sir.

Q. Why didn't you pay them or go to Court on them, Mr. Tate? A. I had been before the Court. I had asked this attorney to represent me, and the attorney had been paid to represent me. I paid him cash out of my pocket, and eleven hundred dollars worth of goods in a trailer.

Q. You gave him cash and other items? A. I gave him eleven hundred dollars worth value [19] in the trailer to represent me. He first wanted to take the car, but then he said he would represent me.

* * *

[20] Q. You were in jail now, on August 7th. How many appearances did you make before the Court with relation to these tickets that we are talking about? A. Six.

Q. You made six appearances in Court? A. Yes, sir.

Q. Did they involve the same traffic ticket, or did they involve different ones? A. The same group of traffic tickets.

Q. Why did you appear six times in Court? A. I plead "Not Guilty."

[21] Q. Were these appearances in Court before the same Judge, the Honorable Raymond Judice? A. Yes, sir, Judge Judice.

* * *

[22] Q. Did he ever advise you that you could have a lawyer or should have a lawyer, or to get one? A. He threatened me with Court action and Court postponement about three or four times, to see if he could locate the policeman that issued these citations.

Q. Did you feel you needed a matter of time? A. I explained to the Judge what I thought had happened.

[23] Q. On each occasion you appeared before the Judge—or the City Recorder, did you try to explain to the Judge you didn't have any money, and that you couldn't pay these fines, after finding out it was going to cost you four hundred twenty-five dollars? A. I did.

Q. Did he ever discuss with you any of these tickets or if you were able to pay them on any of those six occasions that you appeared? A. He did not.

Q. He did not, on any of the six occasions you appeared? A. I explained I had an attorney on two capias, or two of the tickets, and I thought he—he told me they were going to come up sometime. This attorney represented me, and that I had not jumped bond as such.

* * *

[24] Q. And, you could get out of jail by paying four hundred twenty-five dollars. A. He never said if I had four hundred twenty-five dollars I could get out of jail.

* * *

Q. And, you appeared in Court at least six times?
A. Yes, sir.

Q. Without an attorney? A. Yes, sir.

Q. What happened then? A. The fine was the same.

* * *

[26] Q. Are you able to raise three hundred twenty-five dollars today? A. No, sir, I am not.

Q. Can you tell the Judge presiding here in this [27] Court when you could raise three hundred twenty dollars?
A. I would like to go out and try to get a job—my job back, if the company can still use me, and try to pay it.

* * *

Q. [Interrupting] You live in an area of town that's called, I imagine East End of Houston, is that right?
A. Yes, sir.

Q. In the East End area, is a—is there an agency that was founded and supported by charity, primarily by the United Fund? A. Yes, sir.

Q. Do they give any assistance to your family, as far as you know? A. About 80 or 90 percent of what keeps us alive and a roof over our head.

MR. MOSS: All this testimony about all of this poverty is material, but I think in this case it's gone far enough. The State stipulates he is poverty stricken. Let's get [28] on with it.

THE COURT: Is that so stipulated?

MR. NAVARRO: And, also, that her testimony will be the same.

MR. MOSS: Yes, sir, We stipulate she is poverty stricken, also.

MR. NAVARRO: And has been assisted by—

MR. MOSS: She is poverty stricken, period.

MR. NAVARRO: We have a welfare worker from the neighborhood center here to further support the testimony of Mr. Tate as to the assistance his family has been given.

MR. MOSS: We would stipulate he is poverty stricken, and that his whole family has been for all periods of time therein, and probably always will be.

* * *

[30] MR. MOSS: Well, we'll call Mr. Tate to the stand, then.

[31] MR. PRESTON TATE, called to the Witness Stand by The State of Texas, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. MOSS:

* * *

Q. On any of these cases you testified about, were you tried before a jury? A. On the red light and no driver's license capias pro fine I was.

* * *

Q. Who was your lawyer? A. John W. L. Hicks. He has now been since disbarred.

[32] Q. When was he disbarred? A. I haven't been notified by the Bar Association, nor have I been able to obtain a release from him of my files or a reimbursement.

* * *

[34] Q. So, you testified from what Mr. Hicks told you, rather than what was personally told you? A. I went to his home yesterday evening. He's an old man, and he doesn't talk much.

Q. As little as he talks, he did tell you what went on in the Courts on these several cases you testified about? A. That's when I sought legal help to find someone to represent me.

* * *
